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No. 402

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM EUGENE MONDAY, JR., ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 479a-503a) [1] are not reported. The *per curiam* affirmance by the Court of Appeals is reported at 252 F. 2d 789.

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[1] Record references herein are to the printed appendix to the petitioner's brief in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered February 20, 1958. A petition for rehearing was denied on April 29, 1958. By order of Mr. Justice Burton on July 14, 1958, the time for filing a petition for certiorari was extended to and including September 26, 1958. The petition for certiorari was filed on September 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether certain parcels of improved real property sold by the taxpayer in 1946, 1947, 1948 and 1949, were held primarily for sale to customers in the ordinary course of his trade or business within the meaning of Section 117(a)(1) and (j) of the Internal Revenue Code of 1939, thus rendering the gain from such sales taxable as ordinary income for federal income tax purposes.

STATUTES AND REGULATIONS INVOLVED

The following pertinent statutory provisions and Treasury Regulations are printed in the Appendix, *infra*, pp. 7-10:

Internal Revenue Code of 1939, Sections 22(a), 117(a)(1) and (j).
Treasury Regulations 111, Section 29.117-1

STATEMENT

This proceeding involves deficiencies in federal income taxes asserted against William Eugene Monday, Jr. (herein referred to as the taxpayer), for the

years 1946 and 1947, and against the taxpayer and his wife (on the basis of joint returns) for the years 1948 and 1949. The Tax Court made extensive findings of fact (R. 480a-490a), which may be briefly summarized as follows:

For some years prior to 1945 the taxpayer had been acquiring income producing real properties which were held for investment purposes. By 1938 he had acquired approximately $84,000 worth of such properties and between 1938 and 1945 additional such properties worth about $366,000 were acquired. During the taxable years 1946, 1947, 1948 and 1949 here involved additional such investment properties were acquired, in round amounts, of approximately $134,000, $307,000, $154,000 and $166,000, respectively. Substantially all of these properties were still held by the taxpayer at the time of the Tax Court hearing. (R. 480a-481a.)

Beginning in 1944 the taxpayer started acquiring, in most instances *in toto*, large housing projects consisting of individual dwelling units, which had been constructed during the war emergency by large scale contractors or real estate developers under authority of the National Housing Agency and other regulatory bodies, the details of which are not important here. The taxpayer's financial dealings with respect to such housing properties are detailed in Exhibits 10-J to 18-R (not printed in the record below) which were introduced in evidence by stipulation of the parties. (R. 60a-62a.)

Briefly, these exhibits show that as of January 1, 1946, beginning of the taxable period involved, the

taxpayer held title to 784 individual dwelling units, in at least 11 housing projects, having a basis of $3,708,545, which had been acquired over the period from October 1, 1944, to August 1, 1945. During 1946 he acquired 146 additional such housing units having a basis of $696,362 (including $4,862 furniture) in four additional housing projects, and sold 154 such units having a basis of $676,385 for a profit of $162,206.91. During 1947 the taxpayer acquired 53 additional such housing units having a basis of $454,952 in still another housing project, and sold 201 such units having a basis of $935,620 for a profit of $324,620.30. During 1948 the taxpayer acquired 87 additional such housing units (86 units being in still another project) having a basis of $337,724.31, and sold 114 such housing units having a basis of $542,615 for a profit of $210,749.71. During 1949 the taxpayer acquired 5 additional housing units having a basis of $29,435.61 (in projects theretofore held), and sold 66 such housing units having a basis of $319,425 for a profit of $128,989.93. As of December 31, 1949, end of the taxable period involved, the taxpayer still held title to 540 defense housing units having a basis of $2,752,973.92 in a total of 16 housing projects.

The gain realized from such sales of housing units during the years involved was reported by the taxpayer as long term capital gain, but the Commissioner, the Tax Court and the court below found that the gain was realized on the disposition of property held primarily for sale to customers in the ordinary course of trade or business and therefore taxable as ordinary income.

The individual housing units, at least in substantial part, were occupied by rental tenants at the time the various projects were acquired by the taxpayer, and he continued to operate them, through rental agencies, as rental properties, selling individual units only when they became vacant, and then apparently only when several vacancies existed in the particular project. During the taxable years involved he had net cash rental income from defense housing, before deduction of noncash item of depreciation, in the respective amounts of $126,993.20, $62,314.07, $63,401.90, and $54,730.95. (Ex. 10-J.)

ARGUMENT

Whether housing units sold by the taxpayer during the taxable years involved were "property used in the trade or business" within the meaning of Section 117(a) and (j) of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 7-9), gains from the sale of which should be treated as long term capital gains for income tax purposes, is a question of fact,[2] which the courts below correctly resolved against the taxpayer. The facts found by the Tax Court amply support the conclusion reached. There is no conflict and no need for further review.

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[2] See, *e.g.*, *Pool* v. *Commissioner*, 251 F.2d 233 (C.A. 9th), certiorari denied, 356 U.S. 938, rehearing denied, 356 U.S. 978; *Harry Slatkin Builders* v. *Commissioner*, 235 F. 2d 189 (C.A. 6th), certiorari denied, 352 U.S. 928; *Shearer* v. *Smyth*, 221 F. 2d 478 (C.A. 9th), certiorari denied, 350 U.S. 840; *King* v. *Commissioner*, 189 F. 2d 122 (C.A. 5th), certiorari denied, 342 U.S. 829; *Rubino* v. *Commissioner*, 186 F. 2d 304 (C.A. 9th), certiorari denied, 342 U.S. 814.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

A. F. PRESCOTT,
FRED E. YOUNGMAN,
Attorneys.

OCTOBER, 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) [As amended by Section 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) [As amended by Section 115(b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Section 151(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Definitions.*—As used in this chapter—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or

business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), * * * or real property used in the trade or business of the taxpayer;

* * * *

(j) [As added by Section 151(b) of the Revenue Act of 1942, *supra*] *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 117.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.117-1. *Meaning of Terms.*—The term "capital assets" includes all classes of property not specifically excluded by section 117(a)(1). In determining whether property is a "capital asset," the period for which held is immaterial.

The exclusion from the term "capital assets" of property used in the trade or business of a taxpayer of a character which is subject to the allowance for depreciation provided in section 23(l) and of real property used in the trade or business of a taxpayer is limited to such property used by the taxpayer in the trade or business at the time of the sale, exchange, or involuntary conversion. Gains and losses from the sale or exchange of such property are not subject to

the percentage provisions of section 117(b) and losses from such transactions are not subject to the limitations on losses provided in section 117 (d), except that under section 117(j) the gains and losses from the sale or exchange of such property held for more than six months may be treated as gains and losses from the sale or exchange of capital assets, and may thus be subject to such limitations. See section 29.117-7. Property held for the production of income, but not used in a trade or business of the taxpayer, is not excluded from the term "capital assets" even though depreciation may have been allowed with respect to such property under section 23(l) prior to its amendment by the Revenue Act of 1942. However, gain or loss upon the sale or exchange of land held by a taxpayer primarily for sale to customers in the ordinary course of his business, as in the case of a dealer in real estate, is not subject to the limitations of section 117(b),(c), and (d). The term "ordinary net income" as used in these regulations for the purposes of section 117 means net income exclusive of gains and losses from the sale or exchange of capital assets.

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